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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 776

THE CALIFORNIA COMPANY, *Petitioner*,

v.

THE UNITED GAS IMPROVEMENT COMPANY

and

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 1961

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The California Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on October 31, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-16a) is reported at 283 F. (2d) 817. The order

of the Federal Power Commission granting certificates (R. 147-153) is reported at 22 FPC 252; its order denying rehearing (R. 179-181) is reported at 22 FPC 653.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1960 (App. A, *infra*, p. 16a). Petitions for rehearing, timely filed, were denied on December 7, 1960 (App. A, *infra*, p. 17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

Following the recent decision of this Court in *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U.S. 378 (*Cities*), the Federal Power Commission determined upon a price line which governed its issuance of unconditioned certificates of public convenience and necessity under Section 7(e) of the Natural Gas Act to producers of natural gas in south Louisiana. The issues in this case concern the manner in which the Commission established that line and the level of the line. Specifically, the questions presented are:

1. Whether, in determining the line, the Commission is precluded from considering the prices in currently certificated sales which are final and not subject to court or Commission review because such prices are higher than the alleged pre-*Cities* level and some like prices in other sales are subject to further judicial or administrative scrutiny.

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[1] All record references are to the Joint Appendix.

2. Whether, in view of benefits accruing from the instant sale, the Commission abused its discretion in failing properly to consider the insubstantially higher tax reimbursement provided in the contract.

3. Whether, in view of the Commission's experience with and intimate knowledge of the sales made in the south Louisiana gas producing area, the Commission erred in failing to make specific findings as to the details of the sales being compared.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821-833 (1938), as amended, 15 U.S.C. 717-717w, are set out in Appendix B, *infra*, pp. 18a-19a.

STATEMENT

This case concerns the validity of an order of the Federal Power Commission issued under Section 7(c) of the Natural Gas Act (App. B, *infra*, p. 19a) granting certificates of public convenience and necessity to The California Company (California) and The Superior Oil Company (Superior) authorizing them to sell gas produced from certain fields in south Louisiana to United Gas Pipe Line Company (United) for resale in interstate commerce.

By application filed August 22, 1958 (R. 81-85), California sought authorization to sell its gas produced from the Bayou Penchant field, Terrebonne Parish, Louisiana, to United pursuant to the provisions of a gas sales contract dated July 21, 1958 (R. 39-80). Superior requested similar authorization to sell gas to United pursuant to its gas sales contract which covered gas produced by Superior from the Bayou Penchant, Palmetto Bayou and Four Isle Dome fields

in Terrebonne Parish (R. 87-125).[2] Both contracts provided for an initial base price of 21.5 cents per Mcf, plus reimbursement in full up to an amount of 2.3 cents per Mcf, for certain taxes imposed by the state of Louisiana upon the production, severance or gathering of natural gas (R. 56, 59-60, 111, 114-115).

The only issue at the hearing, in which The United Gas Improvement Company (UGI), and the Public Service Commission of the State of New York (New York Commission),[3] as well as the applicants and Commission staff counsel participated, was whether the sales to United at the initial price proposed, were required by public convenience and necessity. On this issue, the record[4] shows that between 30 and 50 certificates had been issued for sales in south Louisiana under contracts providing for the same initial base price (R. 14). The record also shows that none of United's gas purchase contracts contain any favored

[2] Since United had already been certificated in another proceeding to construct and operate facilities to enable it to receive gas produced in the Bayou Penchant and Palmetto Bayou fields, United's related application requested authority to construct and operate at a cost of $1,120,312.00 approximately 10 miles of 16-inch gathering line for the purpose of receiving Superior's gas in the Four Isle Dome field (R. 127-129).

[3] Neither UGI nor the New York Commission purchase gas directly from United. United sells gas to 2,000 customers (R. 25); none of these customers intervened in the proceeding or otherwise protested United's acquisition of the gas involved herein at the contract price.

[4] Testimony and evidence was presented only by the applicants. While UGI, the New York Commission and staff counsel cross-examined the witnesses presented by the applicants, they did not present any testimony or evidence in opposition or rebuttal and the facts of record are not disputed.

nation clauses (R. 15) and that the purchase of gas under the contracts here involved will result in an increase of only 2.7 mills per Mcf in United's average unit cost of purchased gas (R. 18).

The record further shows that United's existing customers have called upon United for steadily increasing volumes of gas since 1948 and will continue to do so, that by the end of 1957 United's annual sales to its customers had reached a level of 1.25 trillion cubic feet and that United currently needs to acquire each year additional reserves in the magnitude of 1.25 trillion cubic feet in order to maintain adequate service to its existing customers (R. 7-11).

Finally, the evidence shows that the contracts were negotiated at arms length (R. 4-6, 29), that the gas reserves involved are estimated to be approximately 636 billion cubic feet (R. 7) and will provide United with approximately 30 billion cubic feet of gas annually (R. 17), that the reserves are located in close proximity to United's existing pipeline system (R. 4), and that other purchasers were attempting to buy the gas (R. 22-23, 30).

By decision issued April 16, 1959, the Examiner recommended the granting of each of the authorizations requested by the applicants (R. 135-144). UGI excepted to the proposed grant of certificates without price condition. In addition, UGI requested the Commission to defer issuance of permanent certificates until after decisions had been rendered by this Court in the then pending proceeding in *Cateo* and by the Court of Appeals for the Third Circuit in a proceeding then pending in *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. (2d) 865 (*Transco-Seaboard*) (R. 146-147).

The Commission acceded to this request. *Catco* was decided June 22, 1959, and *Transco-Seaboard* on August 4, 1959. Thereafter, on August 10, 1959, the Commission issued its order granting unconditioned certificates to California and Superior (R. 147-153).

In its order the Commission found, *inter alia*, that the instant proposed initial prices were not out of line within the standard set out in *Catco*, that none of the prices in United's other contracts would be triggered by the price for the instant sales, and that while the combined effect of the initial prices would be to increase United's overall cost of gas by 2.7 mills per Mcf, that effect did not require, considering the several benefits accruing to United from the acquisition of these reserves, either denial of the sale nor the attachment of a price condition.

Upon review the Court below approved the Commission's use of current initial prices for comparative purposes in determining whether the initial prices in the instant sales meet the requirements of public convenience and necessity under Section 7(e) of the Act (App. A, *infra*, pp. 8a-10a). In addition, the Court rejected the contentions that the initial price proposed in a certificate proceeding must be found to be just and reasonable within the purview of Sections 4 and 5 of the Act and that the "line" at which prices were to be held must accord with an alleged pre-*Catco* level.

The Court, however, held that prices which were under court or commission review and, indeed, like certificated prices in the same area which were not subject to further judicial or administrative review were "under a cloud" or "suspect" and that the Commission abused its discretion in determining a price line based upon such prices. The Court also held that

comparative tax reimbursement provisions, as well as comparative base rates, ought to be taken into consideration in determining whether a proposed initial price is out of line, and that failure to take account of substantial differences in tax reimbursement also constituted an abuse of discretion. Accordingly, the Court vacated the Commission's order and remanded the case to the Commission for further proceedings.

REASONS FOR GRANTING THE WRIT

The order in this case, together with five other orders[3] issued by the Federal Power Commission on August 7 and 10, 1959, represent the first application by the Commission of the principles enunciated by this Court in *Catco* and were intended by the Commission to reflect its resolution of the initial price problem in the south Louisiana gas supply area in accordance with that decision.

In vacating the Commission's authorization of the sale involved in this case at the initial base price proposed, the Court below erred in holding that in determining the price level by which to measure the propriety of a proposed initial price as contemplated

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[3] *South Georgia Natural Gas Company, et al.*, 22 FPC 211; *Sun Oil Company*, 22 FPC 351, and *The Superior Oil Co.*, 22 FPC 369, vacated and remanded in *United Gas Improvement Co. v. Federal Power Commission*, —— F. (2d) ——, CA 5, opinion rendered February 22, 1961; *Sunray Mid-Continent Oil Co.*, 22 FPC 361, vacated and remanded in *The United Gas Improvement Company v. Federal Power Commission*, —— F. (2d) ——, CA 10, opinion rendered January 23, 1961; *Texas Gas Transmission Corp., et al.*, 22 FPC 378, reversed and remanded *Public Service Commission of the State of New York v. Federal Power Commission*, —— F. (2d) —— (C.A.D.C.), opinion rendered December 8, 1960. We understand that a petition for a writ of certiorari has already been filed in the latter case.

by *Catco*, the Commission may not rely on either certificated prices currently under review *or* like permanently certificated prices even though not under review. Not only does this ruling unduly confine the Commission's power of scrutiny, contrary to this Court's teachings in various decisions, including *Catco*, and the plain language of Section 7(e) of the Natural Gas Act, but by excluding from Commission consideration virtually all sales at currently prevailing prices, it in effect requires a rollback of prices to some alleged pre-*Catco* line, a line which the Court below itself recognizes has "no current relevancy" (App. A, *infra*, p. 10a).

In addition to being internally inconsistent, the decision below forebodes serious practical consequences for regulation of natural gas companies, both generally under the Natural Gas Act and particularly with regard to sales of gas from the prolific south Louisiana producing area which has been the focal point of recurrent initial price controversies before the Commission. If the decision below is not reversed, the Commission's ability effectively to deal with the problem will be seriously impaired, with the consequence that further development of gas reserves may be discouraged and needed expansions of service materially delayed. Since definitive clarification of the scope of the Commission's authority under *Catco* is thus urgently needed, review by this Court is plainly warranted.

1. The Court below erred in holding that final, certificated prevailing prices would not properly be relied upon by the Commission in fixing a comparative price line because other prices certificated at the same level were subject to some further administrative or judicial review.

Of the 47 certificates which the Court mentioned as being those upon which the Commission may have relied in establishing an initial price line at 21.5 cents per Mcf base price for gas sold in south Louisiana (see also R. 14-15, *supra*, p. 4), the Court below recognized that at least twelve were final and not subject to any further review. [6] In addition, four more certificates had become final while this case was *sub judice* in the Court below.[6] Regardless of the disposition made by the courts, or the Commission upon remand, of the remaining 31 certificated sales at the same base price, it would have no effect upon the initial prices authorized under the 16 certificated sales which are now final. The certificate holders are and will remain lawfully entitled to receive a base price of not less than 21.5 cents per Mcf plus tax reimbursement without obligation to refund. In these circumstances, these 16 certificated sales stand independently of all other sales and are in no way suspect or subject to any infirmity. Hence these sales in themselves plainly provide a proper frame of reference from which a price line having current relevance can be determined.

As the Court below recognized, *Catco* does not preclude utilization of such currently prevailing prices to establish a price line. *Catco* does not require the Commission to roll back prices to any pre-*Catco* line; indeed this Court in *Catco* did not hold that the prices

[6] These additional four certificates were issued at a 22 cent per Mcf base price in the so-called *Trunkline Gas Company* case (App. A, *infra*, pp. 10a-11a). These certificates had become final by virtue of the dismissal of the petition for review in a decision rendered April 28, 1960 in *Public Service Commission of the State of New York* v. *Federal Power Commission*, 284 F. (2d) 200 (C.A.D.C.). Rehearing was denied on June 1, 1960 and no petition for a writ of certiorari was filed with this Court.

there involved were invalid *per se*. Instead, without itself fixing a line, this Court directed the Commission, in this formative stage of producer regulation, to hold a price line. Having regard for the fundamental relationship which exists between administrative tribunals and the courts, the responsibility for determining upon the line to be held must and does rest solely with the Commission. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 95; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65-66.

In determining the line at which to hold prices, as in all certificate matters, the scope of Commission inquiry is and must be broad. Section 7(e) of the Natural Gas Act states that the Commission must find, before issuing a certificate, that the proposed sale of gas "is or will be required by the present or future public convenience and necessity". This Court has described the administrative function in granting certificates under that standard as:

> "* * * not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and determine from its analysis of the total situation on which side of the controversy the public interest lies * * *. (*United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241)."

Although the Court below recognizes the propriety of the Commission's use of current prices for comparative purposes in establishing a price line, its actual ruling narrowly confines the Commission's power of scrutiny only to a level of certificated prices which has never been challenged in the courts. Thus the ruling of the Court below has the anomalous effect

of frustrating any attempt by the Commission to accomplish the very objective which the Court said should be the Commission's objective under *Catco*—namely, to establish and hold a price line which has current relevancy.

The narrow ruling of the Court below overlooks the broad standard of Section 7(e) and, in effect, compels the Commission to let prices negotiated in the distant past be the sole measure of the public interest and excludes those factors relating to the present and future public convenience and necessity. Such a result is inconsistent with the ruling in *Detroit Navigation* where this Court stressed that in certificate cases:

> "* * * Forecasts as to the future are necessary to the decision. * * * It may be that the public interest requires that future * * * needs be assured rather than left uncertain. The Commission has the discretion so to decide." (326 U.S. 236, 241).

The Commission should be able to consider price in terms of the total situation. The necessity for stimulating the discovery and development of greater supplies for the future needs of the public may be equally, if not more, important than the present cost of gas to the consumer.[7] The responsibility of the Commission in this regard was emphasized by this Court's

[7] The Commission in its order stated (R. 152):

> "Furthermore, United needs this gas to help meet the present and future demands of its customers and the markets it serves. The facts disclose that United delivers to its customers in excess of 1 trillion cubic feet of gas each year, that the demands on United's system increase each year, and that United must continue its policy of buying gas reserves in order to continue to supply the service it has undertaken to provide."

statement in *Atlco* that Section 7(c) "requires the Commission to evaluate *all* factors bearing on the public interest". (360 U.S. at 391) [Emphasis added]

2. The prices in the 16 cases referred to *supra* are not made suspect because they are at the same level as the 31 prices certificated by the Commission in the *Transco-Seaboard* proceedings which were the subject of this Court's remand at *Public Service Commission of the State of New York, et al.* v. *Federal Power Commission*, 361 U.S. 195, 197. That remand by its very terms did not invalidate the level of prices certificated in that case, much less the level established by certificates issued in other and independent proceedings which are now final.

In *Transco-Seaboard* this Court vacated the judgment of the Third Circuit and directed that Court to remand the proceedings to the Commission for reconsideration and redetermination in the light of *Atlco*. In other cases where this Court has similarly vacated a judgment and remanded a case for reconsideration or redetermination in the light of a particular decision, such action has not been construed by either this Court or the lower tribunal to which the case was remanded as requiring it to reach a different result. *Barenblatt* v. *United States*, 354 U.S. 930; *Barenblatt* v. *United States*, 252 F. (2d) 129 (C.A.D.C.), affirmed 360 U.S. 109; *Uphaus* v. *Wyman*, 355 U.S. 16; *Wyman* v. *Uphaus*, 101 N.H. 139, 136 A. (2d) 221, affirmed *sub nom. Uphaus* v. *Wyman*, 360 U.S. 72; *Joines* v. *United States*, 357 U.S. 573; *United States* v. *Joines*, 258 F. (2d) 471 (C.A. 3), *cert. den., sub nom. Joines* v. *United States*, 358 U.S. 880).

In each of these series of cases, the lower tribunals, on remand, adhered to their initial decisions. Thereafter this Court denied certiorari in the *Joines* case and in the others it granted certiorari and affirmed the judgments of the lower courts.

In view of these cases, it is clear that the remand in *Transco-Seaboard* does not compel the Commission to reach a different result in that case upon reconsideration. The prices certificated in these 31 cases therefore cannot properly be held to be suspect in themselves or to cast a cloud upon other like prices.

Moreover, even if the prices in the 31 certificates involved in *Transco-Seaboard* were currently under court review, that fact would not invalidate for comparative price purposes the 16 final certificated prices. Every Commission order is presumed to be valid until judicially determined otherwise. The mere filing of a petition for review does not create a presumption of invalidity.

3. The Court below also erred in ruling that the Commission failed properly to consider the effect of the tax reimbursement provisions of the contracts upon the total price.

While the Commission looked primarily to the initial base prices in determining that the proposed price was not "out of line", the Commission's order on its face shows that it recognized the effect of tax reimbursement. Not only did the Commission actually compare the instant tax reimbursement provisions with those contained in other gas sales contracts submitted in earlier certificate proceedings, but specifically held that

in the circumstances the higher tax reimbursement was justified (R. 150-151):

> "Although the price proposed by The California Company and Superior in this case involves greater tax reimbursement than some other 21.5-cent sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's pipeline, and the need of United to offer some additional price incentive in order to secure the volumes of gas in question."

Moreover, the allowance of the tax reimbursement here involved was not error under the Court's own ruling that insubstantial differences in tax reimbursement are not to be controlling. The record before the Commission shows the instant contract provided for a tax reimbursement in an amount which exceeded that in a previously certificated sale to another pipeline purchaser not subject to judicial review by only 1/8th of a cent per Mcf (R. 31). On its face this slight difference is insubstantial.

4. Finally the Court erred in holding that valid comparisons between the instant prices and other like prices could be had only when the Commission makes findings respecting the details of the various gas sales contracts being compared.

As noted *supra*, the Commission's findings in this case that the instant price was not out of line on a comparative basis (R. 150), and that a number of 21.5 cent contracts have been executed in south Louisiana (R. 150), were made in the context of its issuance in August 1959 of five other orders dealing with sales of

gas produced in south Louisiana. The Commission's knowledge of the details governing sales in this well-known area is replete. Both *Cities* and *Transco-Seaboard*, as well as at least 16 other cases, involved sales from this area.

The Commission's records accumulated in major part from this large number of previous certificate proceedings are voluminous and provide it with a detailed knowledge respecting such factors as price, reserves, contract delivery obligations, quality specifications, terms of measurement, tax reimbursement provisions and other factors. Indeed, without such knowledge the Commission could not find; as it did, the benefit of the instant sales to United in terms of reserves acquired, proximity to United's existing pipeline facilities and delivery volumes (R. 151-152).

It is well established that a court may take judicial notice of the records in other cases in that court. *United States* v. *Pink*, 315 U.S. 203, 216 and cases cited therein. The ruling of the Court below which in effect directs the Commission to spread upon the record the facts already amassed in the records supporting other certificated sales would delay the expeditious conduct of urgent Commission business and is wholly unnecessary to enable the Commission properly to form a judgment whether a proposed sale is comparable to other certificated sales at the same price.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,692

Oct. 31, 1960

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

On Petition to Review Order of the
Federal Power Commission

Before: BARNES and HAMLEY, Circuit Judges, and FOLEY, District Judge

HAMLEY, Circuit Judge:

Under review in this proceeding is a Federal Power Commission order granting certificates of public convenience and necessity enabling two producers of natural gas to sell their product to a natural gas pipeline company. The two producers are The Superior Oil Company (Superior) and The California Company (California), both of which are lessees of natural gas fields in Louisiana. The gas is to be sold to United Gas Pipe Line Company (United) which is engaged in purchasing natural gas and thereafter transporting and selling it in interstate commerce.

The petition to review was filed by The United Gas Improvement Company (UGI), operator of the municipally-owned gas works of the City of Philadelphia. United, Superior, California, and the Public Service Commission

of the State of New York (New York) have intervened in this court. The City of Philadelphia has filed an amicus curiae brief.

On July 21, 1958, California and United entered into a contract for the sale and purchase of natural gas produced under a lease held by California in the Bayou Penchant Field, Terrebonne Parish, Louisiana. On September 8, 1958, Superior entered into a similar contract with United relating to natural gas produced from certain leaseholds and interests in leaseholds held by Superior in the Bayou Penchant, Palmetto Bayou, and Four Isle Dome Fields, Terrebonne Parish, Louisiana. These gas purchase contracts considered together, are for the sale during a term of twenty years of an estimated total of 636 billion cubic feet of reserves. Each contract provides for an initial "base" price of 21.5 cents per Mcf plus 2.3 cents per Mcf tax reimbursement, or a total initial price of 23.8 cents per Mcf.[1]

By virtue of section 7(c) of the Natural Gas Act (Act), 15 U.S.C.A. § 717f(c), it was necessary for Superior and California to obtain from the Commission certificates of public convenience and necessity authorizing them to sell this gas to United. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672. Both companies applied for such certificates. It was also necessary that United obtain such a certificate authorizing it to construct and operate certain lateral

[1] In each contract the initial base price is to govern until March 1, 1963. The base price is then to be 23.5 cents per Mcf for the next four years, 25.5 cents for the next succeeding four-year period, 27.5 cents for the third four-year period, and 29.5 cents during the remaining period of the contract. The price specified for any of these subsequent periods is subject to redetermination according to a formula and procedures set out in the contracts. It is also provided that in the event taxes are imposed in excess of the rate of 2.3 cents per Mcf, United will reimburse Superior and California for three fourths of the amount of such tax increase.

supply facilities required for receiving the gas to be purchased under these contracts.

The three applications were consolidated for hearing and disposition by the Commission. The hearing was held and concluded on March 17, 1959, before a Commission hearing examiner. UGI and New York were interveners in that proceeding. On April 16, 1959, the examiner issued his findings and conclusion along with his decision and order that the certificates be issued as applied for with no conditions attached. 22 F.P.C. 252, 256.

Exceptions to the examiner's decision were filed by UGI. These exceptions were considered and in substance denied by the Commission in a decision and order dated August 10, 1959, and it was ordered that the certificates be issued. 22 F.P.C. 252. UGI and New York filed separate petitions for rehearing. These petitions were denied by the Commission on October 7, 1959. This review proceeding was then instituted.

The quarrel which UGI and New York have with the Commission order is that it has the effect of establishing higher initial producer prices than they believe are warranted.

It is provided in section 7(e) of the Act that a certificate of the kind here in question shall be issued if among other things the proposed sale or construction "is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." Under this provision the Commission is vested with control over the conditions under which gas may be initially dedicated to interstate use.

Among the conditions thus subject to control are those which relate to the initial price proposed to be charged and paid. This does not mean that before certificating such a sale the Commission must determine that the proposed initial price is just and reasonable. It does mean

that there should be by the Commission "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." Atlantic Refining Co. v. Public Service Commission (Cateo), 360 U. S. 378, 391.

The court in Cateo stated the circumstances under which a "responsible reaction" to an initial price proposal would preclude the granting of a permanent and unconditional certificate. ". . . Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest," the court said, "a permanent certificate should not be issued." 360 U. S. at 391. Such a situation would exist, the court indicated, where the proposed price is not in keeping with the public interest

> ". . . because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise." *Id.*

In this event, the court stated, the Commission might in its discretion grant a certificate subject to "such conditions as it believes necessary." 360 U. S. at 391. It follows that ordinarily when the proposed initial price signals the existence of such a situation, a certificate should not be issued or if issued appropriate conditions should be attached.

We say "ordinarily" because in Texas Gas Transmission Corp., 22 F.P.C. 378, review pending, sub nom. Public Service Commission v. F. P. C., No. 15461 (CADC), the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line. Said the Commission:

> ". . . We shall consider any new application based upon a price in excess of any price we have heretofore certificated to be 'out of line' and shall require

conclusive proof from the applicant that the public convenience and necessity requires certification at that price."[2] *Id.* at 388.

In the case before us the certificates were ordered to be issued in permanent form and without price conditions. In the light of Cateo this was warranted in so far as prices are concerned only if the Commission found on substantial evidence (1) that the proposed initial rates were not "out of line" as the Supreme Court used those words, or that if "out of line" the public convenience and necessity of certifying at those rates had been established, and (2) that their approval would not result in a "triggering" of general price rises or an increase of the applicants' existing rates.

We turn first to the "out of line" factor. In its order of August 10, 1959, the Commission concluded that the proposed initial prices of Superior and California in this proceeding are not out of line.[3] Thus the Commission

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[2] It is apparently with reference to this principle that the Commission states in its brief:

> "Where a proposed price is 'in line' a certificate issues on a minimal showing; where, however, the price is 'out of line' the applicant must make an extensive demonstration in support of his rate, else he suffers a certificate denial or a price reduction."

[3] What the Commission said was: "Considering whether the price is out of line under *Cateo*, the facts support the conclusion that Sun's price is not out of line . . . ." The reference to "Sun's" price is an apparent inadvertence, the intended reference being to Superior's and California's prices. An order involving the same issue, in which Sun Oil Company was the applicant, was entered on the same day. Sun Oil Company, 22 F.P.C. 351.

The hearing examiner had made no finding as to whether Superior's or California's proposed prices were out of line. The reason for this is that the decision in Cateo, which first discussed that consideration, was not handed down until after the hearing examiner had issued his decision.

never reached the question of whether prices which were out of line were nevertheless consonant with the public convenience and necessity.

UGI and New York challenge the Commission's ruling on two grounds: (1) The Commission misconceived what the court in Cateo meant by the "line"; (2) assuming that the Commission properly construed that term, the record does not support the finding that the initial prices here proposed hold the line.

UGI and New York advance several reasons why in their opinion the criteria applied by the Commission evidence a misconception of what the court in Cateo meant by the "line." One such reason is that the Commission predicated the price line upon comparative prices paid by pipeline companies in the area rather than upon prices paid by the applicant pipeline company.

That this was the principal criterion employed, with some special consideration of tax reimbursement provisions and the competitive situation, is indicated by this statement contained in the Commission order under review:

> "Considering whether the price is out of line under *Cateo*, the facts support the conclusion that Sun's price is not out of line on a comparative basis. Much south Louisiana gas is today being sold at 21.5 cents per Mcf plus tax reimbursement. Numerous other pipeline companies compete in this general area, and a number of 21.5-cent contracts have been executed. Although the price proposed by The California Company and Superior in this case involves greater tax reimbursement than some other 21.5-cent sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's Pipeline, and the need of United to offer some additional price incentive in order to secure the volumes of gas in question.

> "The facts disclose that there were several prospective purchasers for this gas in addition to United, and that several offers were made to both The California Company and Superior for this gas. At least one such offer was at the same price United offered, but The California Company accepted United's offer, primarily because it preferred the 'take' provisions of United's contract. Superior preferred the United offer because there would be less delay in making deliveries." 22 F.P.C. 252, 254-55.

In Cateo the proposals concerned a portion of the outer continental shelf where the applicant pipeline company, Tennessee Gas Transmission Company (Tennessee), had no other contracts. Likewise, except for some contracts involving smaller reserves and smaller future potentials, no other pipeline company held any contracts in that area. In the absence of any comparative prices in the outer continental shelf area[4] the court in Cateo took notice of prices paid by Tennessee in another offshore area, the weighted average cost of gas to Tennessee in all areas, and prices paid by Tennessee in southern Louisiana. These other prices were substantially below the proposed initial rate in Cateo, and the court found nothing in the record to justify the increase. It was therefore held that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of a permanent certificate.

The public has an interest in both obtaining reasonable rates and the expeditious dedication of needed new gas reserves. The first such interest is accentuated when as here producer prices have been advancing from plateau

[4] In our view the reference in Cateo to the applicant pipeline company's other prices does not imply a ruling that under other circumstances prices paid by other pipeline companies in the same area may not be used for comparative purposes in setting a price line.

to plateau without regulatory supervision. The second such interest would be adversely affected by the lengthy delays occasioned if disposition of certificate applications must await formal adjudication of proposed initial rates.

The "hold the line" technique spelled out in Cateo is a stopgap device designed to meet the need created by this combination of circumstances in a manner as simple, direct and effective as possible. Its function is to afford standby protection to the public pending normal rate adjudicatory proceedings, while enabling the Commission to act upon certificate applications with reasonable dispatch.

Considered in this light, the "line" referred to in Cateo may properly be refereneed to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce. Where some or all of the relevant producer prices are those paid by other pipeline companies it is especially important that they be consulted for comparative purposes. Otherwise an applicant pipeline company would be bound to a line established by its own past prices. In that event it would not be able to contract for new reserves in competition with pipeline companies whose existing prices would warrant a higher line. Where there are no relevant existing producer prices with which a price proposal may be compared, Cateo indicates the best criterion of a proper price line may be the applicant's prices elsewhere, qualified where necessary by substantial evidence explaining price differentials.

Existing producer prices are relevant for comparative purposes only if they pertain to gas production in the same or an analogous area and if other principal features of the contracts are fairly comparable. Thus the contracts should be comparable from the standpoint of gas reserves and future potentials. The significance of any disparities existing as to these conditions should be explained by Commission findings based upon substantial evidence. Substantial variation in the quality of gas sold should be

similarly treated. The Commission followed this course in Transwestern Pipeline Co. et al., 22 F.P.C. 391. Disparate provisions relative to facilities to be provided and other services to be rendered should be given effect as well in determining the propriety of the analogy to rate under other existing contracts.

In our view, however, a determination of relevancy for comparative purposes does not require examination into factors such as relative production costs which are not reflected in specific terms of the contracts. If this were required to implement the "hold the line" technique, the procedure would assume much of the complexity of a rate adjudication. This would tend to defeat the objective of providing simple, direct and effective stopgap protection for the consuming public. Where there are no producer prices which are otherwise comparable and resort must be had to other criteria, however, relative production costs, need, competition between pipeline companies, and no doubt other factors become significant.

From all that is said above it will also be understood that we find without merit the contention that the price line must necessarily accord with the pre-Cateo line. We agree with the view expressed by the Commission in Texas Gas Transmission Corporation et al., 22 F.P.C. 378, 388, that factors such as increased production costs since Cateo, comparative accessibility of field locations, and comparative depth of sands tend to make pre-Cateo prices irrelevant for comparative purposes in other cases.

UGI and New York futher contend, however, that if the prices paid by other pipeline companies may be resorted to for comparative purposes, such comparison must at least be limited to prices which have been authorized only after the Commission's careful scrutiny according to Cateo standards. It is argued that until it is demonstrated that such other prices have themselves been justified in certificate proceedings or tested in rate pro-

ceedings "they are absolutely meaningless as a touchstone."

The Commission points out that in utilizing price comparisons for the purpose of drawing a "line" the Commission has limited itself to a consideration of certificated prices. It nevertheless concedes that these certificated prices for the most part have never been subjected to Commission scrutiny. But, the Commission argues in effect, such a limitation is neither expressed nor implied in the Cities decision, and to impose such a limitation would render the whole technique impractical.

As previously indicated, the price line is intended to reflect current conditions in the industry. Therefore, comparative prices upon which it is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce. The limitation urged by UGI could well defeat this objective by restricting the comparison to a small number of contracts under which little gas moves today. It could, in fact, require a rollback to prices having no current relevancy.[5]

Assuming the criteria employed by the Commission to be otherwise acceptable, we hold that the consideration for comparative purposes of producer prices not previously scrutinized does not evidence an abuse of discretion.

A third criticism which is leveled against the criteria employed in fixing a price line is that the Commission sanctions the use for comparative purposes of prices which are under review in pending court and Commission proceedings.

This objection is not raised as an abstract proposition. UGI contends that of the forty-seven producer price schedules upon which the Commission may have relied

[5] The Commission points out that virtually none of the south Louisiana prices have been scrutinized in rate or certificate proceedings.

in fixing the line at 21.5 cents per Mcf (basic rate) in this case[6] four such schedules established in Trunk Line Gas Company et al., 22 F.P.C. 110, were and are under review in the Court of Appeals for the District of Columbia. Another thirty-one of these forty-seven schedules, UGI asserts, are presently under re-examination by the Commission in the Transco-Seaboard certificate case.[7]

When an order certificating an initial rate is under court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged.

For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in

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[6] The Commission order and the record on which it is based do not reveal what producer price schedules were relied upon in fixing the line at 21.5 cents. In an appendix to the Commission's brief in this court there are listed forty-seven certificated schedules on file with the Commission prior to August 10, 1959, in which an initial price of 21.5 cents or more was specified. It is stated in the appendix that this list "is not exhaustive." It is not represented in the Commission's brief that these are the actual schedules relied upon by the Commission in its order of August 10, 1959.

[7] Public Service Commission of New York v. Federal Power Commission, et al., 361 U.S. 197, reversing 3 Cir., 269 F. 2d 865, with directions to remand to the Federal Power Commission "for reconsideration and redetermination in the light of *Atlantic Refining Co. v. Public Service Commission of New York (Cateo)*, 360 U. S. 378."

establishing a price line to rely upon producer prices which are under such a cloud.

We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings.

It is next contended that the technique used by the Commissioner sanctions the use for comparative purposes of prices scrutinized by the Commission in other proceedings in which a party to the current proceedings was denied the right to participate.

Here again the objection is not abstract, but is directed to circumstances existing in this case. Of the forty-seven producer price schedules referred to in footnote 6, UGI asserts that sixteen schedules were certified in four proceedings in which UGI and New York were denied the right to participate. Denial of the right to participate was apparently on the ground that UGI and New York were not interested in those proceedings. The proceedings involved producer sales of gas destined for resale in parts of the country where UGI has no facilities and New York has no jurisdiction.[8]

Where such a denial of the right to participate in prior proceedings has not been judicially challenged, the fact of denial should not preclude the Commission from referring

[8] See, for example, Trunkline Gas Company, et al., 22 F.P.C. 110, order issued on July 22, 1959, and opinion of Commissioner Connole dissenting therein. As previously noted, the order entered in this proceeding involving four of the rate schedules which are listed in the appendix to the Commissioner's brief is under review in the Court of Appeals for the District of Columbia.

to the initial price therein certified in the process of fixing a line in a subsequent proceeding. This is true because if not judicially challenged a Commission order excluding participation by others must be taken as correct.

Where, however, denial of the right to intervene in the earlier proceedings is being questioned in the courts the rate schedule certificated in that proceeding ought not to be so utilized. We have heretofore stated the reasons why prices established in an order subject to a pending court review ought not to be considered in fixing a price line.

Another objection advanced against the Commission's manner of proceeding is based on the fact that outstanding contracts deal in a variety of ways with the matter of tax reimbursement. Because of this variety of treatment, it is contended, prices accepted for comparative purposes should include the tax reimbursement feature.

In determining that the initial prices proposed by Superior and California were not out of line the Commission considered only the base price of 21.5 cents per Mcf and did not include the 2.3 cents per Mcf tax-reimbursement feature. Considering only the base rate, the Commission was able to say that it was not out of line with the other basic rate schedules upon which it must have relied. Had it considered the total initial price, including tax reimbursement, however, the Commission could not have made that statement.[9]

[9] This is made clear in the hearing examiner's decision stating:

> "... Each contract provides for an initial 'base' price of 21.5¢ per Mcf plus 2.3¢ per Mcf tax reimbursement, or a total initial price of 23.8¢ per Mcf. This total price is 0.25¢ per Mcf higher than any at which a sale has been certificated by the Commission in South Louisiana. There are other sales which have been certificated at the same 'base' price; but no other involves a contract which calls for this 'base' price plus a tax reimbursement of as much as 2.3¢, which is the total tax at the present time." 22 F.P.C. 252, 257.

The Commission correctly points out that the taxes paid by a producer represent out-of-pocket cost. Hence reimbursement for such taxes does not in and of itself represent gain by the producer. The right of recoupment of a volumetric tax cost is established in Commission practice.

The fact remains, however, as the Commission concedes, that tax reimbursement is an item for bargaining between producer and pipeline company. As a result of such bargaining one pipeline company may agree to a 21.5-cent initial price but only partial reimbursement for taxes. In another contract (the instant case, for example) a pipeline company may obtain the same initial price but in order to do so may have to agree to full reimbursement for taxes at present rates. It is apparent that the second producer has obtained a better price than the first one, for it has been able to pass along all of its volumetric tax costs as a separate item.

It follows from this, we believe, that comparative tax reimbursement plans as well as comparative base rates ought to be taken into consideration in determining whether a proposed initial price is out of line. Except where the difference in tax reimbursement features is relatively insubstantial, it is our opinion that failure to take account of such a difference would be an abuse of discretion.

Summarizing on this branch of the case, we are of the view that with respect to the use for comparative purposes of prices presently under review and the failure to consider tax reimbursement features in making such comparisons the criteria employed by the Commission in fixing a line by which to test the proposed initial rates of Superior and California fall short of what is required under Cateo and the Act. Since it was apparently upon the basis of a line so determined that the Commission ordered issuance of a permanent and unconditional (as to prices) certificate, we hold that the Commission abused

its discretion in so doing and that the order must be set aside.

In view of the conclusion just stated it is not necessary to deal at length with the other arguments which have been advanced by UGI and New York. Since, however, further proceedings before the Commission will now be required, we briefly state our views on other questions which the Commission must again face.

Concerning the adequacy of the evidence to support the Commission findings, it is to be remembered that this is not a rate proceeding. Hence a comprehensive showing such as would therein be required is not necessary. Nevertheless, where the Commission relies upon existing certificated rates in establishing a line, evidence ought to be submitted concerning those rates. The contracts ought to be identified, and each should be subject to test as to arms-length bargaining, identity or similarity of gas production area, nature of gas reserves, quality of gas, facilities to be provided and services to be performed.

With regard to the factor of triggering of price increases, we find nothing wrong with the Commission finding that United's other contracts will not be substantially affected. They contain no "favored nation" clauses. The testimony as to a noncontractual "favored nation" policy concerning one customer does not seem to us of sufficient importance to undermine the Commission's finding. In any event the petitions for rehearing did not raise this question. Hence, in view of section 19(b) of the Act the point may not be raised here. Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U. S. 635, 649, 651.

The Catco decision in discussing "triggering" refers not alone to possible increases in the applicant's rates, but to possible "general price rises." The Commission order appears to contain no finding as to whether the proposed

initial prices might result in a triggering of general price rises.

The Commission order is vacated and the matter is remanded to the Commission for further proceedings consistent with this opinion.

(Endorsed) Opinion Filed Oct. 31, 1960.

FRANK H. SCHMID, *Clerk*.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,692

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

Decree

On Petition to Review an Order of the Federal Power Commission.

This cause came on to be heard on the Transcript of the Record from the Federal Power Commission and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said Federal Power Commission in this cause be, and hereby is vacated, and that this cause be, and hereby is remanded to the Federal Power Commission for further proceedings consistent with the opinion of this Court.

(ENDORSED) Decree
Filed and entered: October 31, 1960
FRANK H. SCHMID, *Clerk*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16,[illegible]2

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

vs.

FEDERAL POWER COMMISSION, *Respondent*.

On Petitions for Rehearing

Before: BARNES and HAMLEY, Circuit Judges, and FOLEY, District Judge

The petition for rehearing of United Gas Pipe Line Company and the joint petition for rehearing of The California Company and The Superior Oil Company, all intervenors herein, are denied.

The order denying petitions for rehearing entered on December 6, 1960, is vacated.

Dated December 7, 1960.

/s/ STANLEY N. BARNES
Circuit Judge

/s/ FREDERICK G. HAMLEY
Circuit Judge

/s/ ROGER G. FOLEY
District Judge

(ENDORSED) Filed
December 7, 1960
FRANK H. SCHMID, *Clerk*

APPENDIX B

The pertinent provisions of the Natural Gas Act are as follows:

Sec. 7(c). No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases

of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

Sec. 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 776 and 780

THE CALIFORNIA COMPANY and THE SUPERIOR OIL COMPANY, *Petitioners*,

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT THE UNITED GAS IMPROVEMENT COMPANY IN OPPOSITION

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BRIEF FOR RESPONDENT THE UNITED GAS IMPROVEMENT COMPANY IN OPPOSITION

OPINIONS BELOW

The order of the Federal Power Commission (R. 147-153) is reported at 22 FPC 252; the order denying rehearing (R. 179-181) is reported at 22 FPC 653. The opinion of the United States Court of Appeals for

the Ninth Circuit (Calco Pet. App. 1a-16a; Superior Pet. App. 1a-16a)[1] is reported at 283 F. 2d 817.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 31, 1960 (Calco Pet. App. 16a; Superior Pet. App. 17a). Petitions for rehearing, timely filed, were denied on December 7, 1960 (Calco Pet. App. 17a). The petitions for writs of certiorari were filed on March 2, 1961 (No. 776) and March 4, 1961 (No. 780). This Court has jurisdiction under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Was the court below correct in concluding (as have three other Courts of Appeals) that the Federal Power Commission, consistent with its obligation to protect gas consumers under the Natural Gas Act as interpreted in this Court's *CATCO* decision,[2] could not finally certificate gas producer sales at a price representing a sharp increase over pre-CATCO contract prices in the same area, where the only support offered for the challenged price was the existence of other pre-CATCO decision prices in the area certificated by the Commission prior to *CATCO* on equally defective records and under an erroneous view of law?

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[1] The petitions for certiorari filed by The California Company (No. 776) and The Superior Oil Company (No. 780) have been abbreviated "Calco Pet." and "Superior Pet.", respectively.

[2] *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378 (1959).

STATEMENT

The California Company and The Superior Oil Company (Petitioners) seek from the Federal Power Commission unconditioned certificates of public convenience and necessity authorizing the sale of natural gas in interstate commerce from fields in South Louisiana at an initial price of 23.8 cents per thousand cubic feet (per Mcf).[3]

The hearings before a Commission examiner occupied a single day, March 17, 1959, during a period when Commission precedents provided (1) that natural gas producers could justify an initial price in a certificate case merely by showing a market for the gas at the proposed price,[4] and (2) that proponents of a price condition not only had the burden of showing that the contract price was not justified but also had the burden of establishing the reasonableness of a proposed alternative price.[5]

Petitioners, relying expressly on these rulings (R. 3), introduced only their contracts (R. 39-80, 87-125) plus testimony concerning reserves (R. 5, 7), the need of the purchaser for the gas (R. 7-11), the inability of the purchaser to obtain the gas at any lower price (R. 5) and the existence of arms-length bargaining (R. 5-6, 29-30, 32). Petitioners did *not* introduce evidence of other existing prices in the area, although

[3] Of this total, 2.3 cents per Mcf was allocated by the parties to pay state taxes (R. 59-60, 114-15).

[4] I.e., merely by submitting a bona fide sale contract with a non-affiliated pipeline company. See, e.g., *Hope Natural Gas Company*, 19 FPC 405 (1958).

[5] See e.g., *Seaboard Oil Company*, 19 FPC 416, 420, 423 (1958) (Opinion No. 369).

one witness mentioned the initial prices of some six sales certificated from the same area without otherwise identifying the sales on the Commission's records (R. 34-35).[6]

Another applicant witness, on cross-examination, referred to "30 or 40 or 50" certificates in South Louisiana with a base price of 21½ cents per Mcf but did not otherwise identify them (R. 14).

Petitioners conceded, however, that the proposed price was the *highest* ever paid in that area by the buyer (R. 15) or received there by Petitioners (R. 30, 38).

The *CATCO* decision, which overturned the Commission's position on the burden of proof in initial price proceedings, was handed down in June, 1959, 360 U. S. 378, several months after the March 17th hearing in this case. On August 4, 1959 the Third Circuit Court affirmed the Commission in the so-called *Transco-Seaboard* proceeding subsequently reversed by this Court.[7] Immediately thereafter, on August

[6] The witness, in mentioning these sales, did not describe the substantiality of the volumes involved, the finality of the certificates or their comparability with the contracts in issue, e.g., as to nature of gas reserves, quality of gas, and facilities provided or services performed (R. 34-35). All but one of the orders apparently referred to were ultimately reversed on appeal. The Sun Oil Company sale to United Gas Pipe Line Company, 22 FPC 351, was reversed in *United Gas Improvement Co.* v. *FPC*, No. 18115, CA5 (February 22, 1961); various sales to Transcontinental Gas Pipeline Corporation were reversed in *Public Service Comm'n* v. *FPC*, 361 U.S. 195 (1959). Respondents were precluded by Commission intervention policy from challenging the sale to Southern Natural Gas Company. See, e.g., *Trunkline Gas Company*, 22 FPC 110 (1959).

[7] *Public Service Comm'n* v. *F.P.C.*, 367 U.S. 195 (1959).

7 and 10, 1959, the Commission issued six decisions, of which the order under review was one, unconditionally certificating South Louisiana sales in the 22-24 cent initial price range on substantially similar records.

The Commission's orders, couched in virtually identical terms in all six cases, relied primarily on the bare existence of certain unidentified field prices, at or higher than the CATCO level, in sales made following the execution of the CATCO contracts but before this Court's *CATCO* decision (R. 150-151). The Commission regarded these unidentified sales as establishing a "line" on which it could rely in authorizing the instant sale.[8]

Respondent, UGI, which had been permitted to intervene in four of the proceedings, including the instant case, sought rehearing of four of the orders. Respondent Public Service Commission, which had intervened in all five cases, also sought rehearing.[9]

When these petitions for rehearing were denied, respondents obtained review of the instant order in the Ninth Circuit, and of the other orders in the Courts of Appeals having jurisdiction over the respective orders under Section 19(b) of the Natural Gas Act.

[8] The Commission also relied on the fact that there would be no "triggering" of "favored-nation" price clauses as a result of the proposed price and on the pipeline's "need" for the gas (R. 151-152).

[9] The sixth order, in *South Georgia Natural Gas Co.*, 22 FPC 211, became final since neither respondent was eligible in the Commission's view (*see Trunkline Gas Co.*, 22 FPC 110) to participate in that proceeding.

(15 U.S.C. § 717r(b)).[10] The court below, as well as the Courts of Appeals for the Fifth, Tenth and District of Columbia Circuits, reversed. (These opinions are reprinted in the petition seeking review of the District of Columbia Circuit decision, *Shell Oil Company* v. *P.S.C. of New York*, No. 774, This Term, pp. 49-85). Although the opinions differ somewhat in emphasis and detail, the courts are unanimous in holding that the Commission erred when it relied on "pre-*CATCO*" decision prices (which were the progeny of the presently still unauthorized and "suspect" CATCO price)[11] in finding that the proposed prices (four of which exceeded the CATCO price) met the public convenience and necessity. The gravamen of the five opinions is the following statement from the opinion below (Calco Pet. 10a-11a) which is quoted and adopted in the decisions of the District of Columbia and Fifth Circuits, and partially quoted and fully

[10] Respondent Public Service Commission of New York sought review of the order in *Texas Gas Transmission Corp., et al.*, 22 FPC 378, rev'd, *Public Service Comm'n* v. *FPC*, No. 15,461, CADC (December 8, 1960), cert. pending sub nom. *Shell Oil Co.* v. *Public Service Comm'n*, Nos. 774, 793, Oct. Term 1960 (Opinion printed Shell Pet. 28-33). Respondent The United Gas Improvement Company sought review of the other four: *Sunray Mid-Continent Oil Co.*, 22 FPC 361, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 6280, CA10 (January 23, 1961) (Opinion printed Shell Pet. 49-55); *Sun Oil Co.*, 22 FPC 351, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 18,112, CA5 (February 22, 1961) (Opinion printed Shell Pet. 56-66, 69-85); *The Superior Oil Co.*, 22 FPC 369, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 18,113, CA5 (February 22, 1961) (Opinion printed Shell Pet. 67-85); and the instant case, *The California Co., et al.*, 22 FPC 252, rev'd, *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960).

[11] The *CATCO* proceeding has not yet been decided on remand

concurred in by the Tenth Circuit (Shell Pet. pp. 31, 52, 64-65):

> When an order certificating an initial price is under Court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged.
>
> For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in establishing a price line to rely upon producer prices which are under such a cloud.
>
> We go further and express the view that where a substantial number of certified prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings.

ARGUMENT

Immediately following this Court's *CATCO* decision, the Federal Power Commission certificated six substantial South Louisiana natural gas sales at prices as high as or higher than the questioned CATCO price. The Commission in all of these proceedings relied

primarily on its general awareness, *dehors* the respective records, that, following execution of the 1956 CATCO sale contract, it had authorized a number of additional sales at or above the CATCO price level. The Commission concluded that the bare existence of these contract prices was sufficient to support the instant price, despite the fact that they were at or above the CATCO level and many were then being challenged in the Commission and the courts.

When five of these Commission orders were appealed, four Courts of Appeals,[12] including the court below, applying this Court's *CATCO* decision, held that the Commission, pending establishment of just and reasonable rate levels, could not—consistent with the Gas Act's policy of consumer protection—select as an interim base "line" from which to certificate sales in South Louisiana *without* price conditions the very "suspect" price level which had set an unprecedented new high for South Louisiana in *CATCO*, and which was and is still under consideration by the Commission.

The decisions of the four Courts of Appeals are in substantial agreement and the result reached by the four courts is clearly consistent with, and indeed compelled by *CATCO*. The Commission, apparently acquiescing in the rule stated in these cases, has not sought review. Since the principles governing the application of Section 7 to producer rates have been clearly stated both in *CATCO* and these decisions, there is manifestly no need for this Court to explore further what is actually the *temporary* problem of providing

[12] Eleven circuit judges joined in these opinions; Judge Brown of the Fifth Circuit dissented in two of the cases which were argued jointly.

consumer protection against "vaulting" initial gas prices during the preliminary stages of producer regulation.

Hence, there is no warrant for certiorari in this case.

1. The order of the Commission reversed by the Ninth Circuit approved a price in South Louisiana exceeding the CATCO sale price by 1.4 cents per Mcf.[13] This price exceeded by 10.14 cents per Mcf the weighted average price (13.66 cents per Mcf) paid for gas by major pipelines in 1958 jurisdictional sales (R. 175), and should be contrasted with the average cost of approximately 12 cents per Mcf found by the Commission for Phillips Petroleum Company's production in 1954 and 1956 (*Phillips Petroleum Company*, 24 F.P.C. —, Opinion No. 338, September 28, 1960). The price, like the CATCO price, represented a sharp increase over the level at which practically all gas was committed to the interstate market prior to the CATCO contract. The Commission was instructed in *CATCO* that the Natural Gas Act requires it to protect consumers by appropriate price conditions against such "suspect" and possibly unlawful charges, pending a determination in other proceedings of the producers' actual costs and revenue needs.[14] The Court of Appeals has merely reaffirmed that instruction.

[13] 23.8 cents per Mcf. The CATCO price appeared to be 22.4 cents per Mcf, including tax reimbursement, at the time of this Court's *CATCO* decision. However, as a result of this Court's decision in *United States* v. *Louisiana*, 363 U.S. 1 (1960), the CATCO price appears to be 21.4 cents per Mcf.

[14] The parties in the instant case contemplate sales of 30 billion cubic feet per year (R. 17). Assuming a current "just and reasonable" rate for South Louisiana approximating the 1958 weighted average of 13.66 cents per Mcf, *supra*, the effect of the Commission's decision would have been to overcharge the ultimate consumer—without hope of reparation—at the rate of $3,042,000 per year on this sale alone.

2. Petitioners argue that the holdings of the four Courts of Appeals unduly limit the Commission's discretion under Section 7 of the Act (Calco Pet. 9-11; Superior Pet. 12-13) and handicap the Commission in disposing expeditiously of producer certificate proceedings (Calco Pet. 8, 14-15; Superior Pet. 8-9, 12). The short answer to these fears is that the Commission apparently does not share them, since it has not sought review. Moreover, the fact that the Commission cannot rely on prices certificated under an erroneous view of law is hardly a procedural handicap or limitation on the Commission's discretion in authorizing producer sales, since there is no reason why the Commission cannot follow the course suggested by *CATCO*, and condition the price pending further information as to producer costs and revenue needs.[15]

[15] Petitioner Superior (but not California) asserts (Pet. 16) that two conclusions by the court below (that the Commission cannot rely on "suspect" prices, and must consider tax reimbursement) were not raised in respondent UGI's rehearing petition, and hence could not be passed upon by that court. The argument seems at most to suggest a distinction without a difference, since respondent UGI's petition for rehearing vigorously attacked the level of the full 23.8 cents per Mcf price (including tax reimbursement) (R. 165) and argued that the Commission could not rely on pre-*CATCO* decision prices certificated under an erroneous view of the law (R. 168). Respondent, in any case, did not know until the filing of the Commission's brief in the Court of Appeals that the Commission had actually relied on prices then subject to court review, for it was in that brief that the "price line" argument was first developed by the Commission's Solicitor and attributed to the Commission (Calco Pet. 11a, fn. 6).

CONCLUSION

For these reasons it is respectfully requested that the petitions for certiorari be denied.

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March 23, 1961

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 776 and 780

THE CALIFORNIA COMPANY and THE SUPERIOR OIL COMPANY,

Petitioners,

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

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BARBARA M. SCHOW

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

Nos. 776 and 780

THE CALIFORNIA COMPANY and THE SUPERIOR OIL COMPANY,

Petitioners,

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

Statement.

For the reasons set forth in the brief for co-respondent The United Gas Improvement Company, in opposition to the instant petitions for certiorari, and for the additional reasons set forth in the brief for respondent Public Service Commission of the State of New York, in opposition to the petitions for certiorari to the United States Court of Appeals for the District of Columbia Circuit in *Shell Oil Company, et al. v. PSC, NY* and *Hope Natural Gas Company, et al. v. PSC, NY*, Sup. Ct., Oct. Term, 1960, Nos. 774 and 793, we oppose the instant petitions for certiorari.

In our view, any review by this Court of (a) the determination below, (b) that involved in Nos. 774 and 793, or (c) those involved in any petition for certiorari which may be filed with respect to the related determinations of the Fifth[1] and Tenth[2] Circuits, necessarily would entail the following questions:

(1) Did the Court[s] below commit reversible error in ordering remanded to the Federal Power Commission, August 10, 1959 unconditional certifications of pinnacle-high Southern Louisiana gas producer sales prices, issued by FPC upon records of no better support therefor than those this Court reviewed and ordered remanded in *Catco*[3] on June 22, 1959 and in *Transco-Seaboard*[4] on December 14, 1959?

(2) Could the FPC evade, properly discharge or preclude its *Catco* (22.4¢ per Mcf) and *Transco-Seaboard* (23.3¢ per Mcf) remand assignments (to "hold the line" against unsupported and therefore unwarranted producer price increases such as those) by blithely continuing to certificate unconditionally Catco and Transco-engendered, as high or higher prices (23.8¢ per Mcf) upon equally deficient records compiled before this Court spoke on the subject?

(3) Could the FPC establish the existence and the propriety of that pinnacle-high price line—or any other—simply by making general reference to other Catco and Transco-like, outstanding certifications nearly all of which were then under pending review and destined for reversal?

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[1] *United Gas Improvement Co.* v. *Federal Power Commission*, USCA, 5th, Nos. 18112 and 18113, February 22, 1961 (see Pet. No. 774 at pp. 56-66 and 67-68). These cases are pending on applications for rehearing filed by intervenors.

[2] *United Gas Improvement Co.* v. *Federal Power Commission* USCA, 10th, No. 6280, January 23, 1961 (see Pet. No. 774 at pp. 49-55). Issuance of the mandate has been stayed to April 23, 1961 on application of intervenors.

[3] *Atlantic Refining Co., et al.* v. *PSC, NY*, 360 U.S. 378.

[4] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

In our view, the opinion below of October 31, 1960,[5] that of the DC Circuit of December 8, 1960,[6] the Tenth Circuit of January 23, 1961,[7] and those of the Fifth Circuit of February 23, 1961[8] reflect, uniformly and abundantly, that the answer to each of the above inquiries would have to be in the negative.

Conclusion.

Since each is a correct application of *Catco*, and since the principal design of the petitions is nothing more than an effort to re-argue *Catco* and *Transco-Seaboard* before this Court, it is respectfully suggested that the instant petitions present no issue warranting this Court's review. All of them should be denied.

Respectfully submitted,

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[5] Pet. No. 776 at pp. 1a-16a; Pet. No. 780 at pp. 1a-16a.
[6] Pet. No. 774 at pp. 28-33.
[7] Pet. No. 774 at pp. 49-55.
[8] Pet. No. 774 at pp. 56-66 and 67-68.

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IN THE

Supreme Court of the United States

October Term, 1960

Nos. 776 and 780

THE CALIFORNIA COMPANY AND
THE SUPERIOR OIL COMPANY, *Petitioners*,

v.

THE UNITED GAS IMPROVEMENT COMPANY AND
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief Amicus Curiae of the City of Philadelphia in Opposition to the Petitions for Certiorari

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THE UNITED GAS IMPROVEMENT COMPANY AND
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Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF AMICUS CURIAE OF THE CITY OF PHILADELPHIA IN OPPOSITION TO THE PETITIONS FOR CERTIORARI

OPINIONS BELOW

The order of the Federal Power Commission (R. 147-53) is reported at 22 FPC 252; the order denying rehearing (R. 179-81) is reported at 22 FPC 653. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 283 F. 2d 817.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b).

QUESTION PRESENTED

Was the court below correct in concluding (as have three other Courts of Appeals) that the Federal Power Commission, consistent with its responsibility to protect gas consumers under the Natural Gas Act as interpreted in this Court's *CATCO* decision,[1] could not issue unconditioned certificates for gas producer sales at a price representing a sharp increase over pre-*CATCO* contract prices in the same area, where the only support offered for the challenged price was the existence of other pre-*CATCO* decision prices in the area, certificated by the Commission prior to *CATCO*, on equally defective records and under an erroneous view of the law and where such decisions were under review?

INTEREST OF AMICUS CURIAE

The ultimate consumer has the major interest in any proceeding affecting the producer's initial price of gas. He has no other course but to pay the increases in his monthly bill which result from the failure by those appointed to regulate in the public interest, to react responsibly to the gas producers' efforts to increase basic prices of gas.

The City of Philadelphia represents over 2,000,000 inhabitants, 600,000 of whom are consumers of gas distributed by respondent, the United Gas Improvement Com-

[1] *Atlantic Refining Co. v. P. S. C. of New York*, 360 U. S. 378 (1959).

pany (hereinafter referred to as "UGI"), through the municipally owned gas distribution system.[2]

The City of Philadelphia appeared as amicus curiae in the Court below because the proposed initial prices would have the effect of increasing substantially the cost of gas to United Gas Pipeline Company, an increase which ultimately would be reflected in UGI's rates and would adversely affect the City, its inhabitants and its Philadelphia Gas Works.

The imposition of a price condition is of vital importance to the ultimate consumer. Unless a condition as to price is made to the certification, the only safeguard against consumer exploitation would lie in a subsequent determination under Section 5 of the Act that the price is unjustified. Obviously, however, this is an inadequate remedy since a Section 5 proceeding gives only prospective relief. Moreover, the determination of proceedings under Section 5 by this Commission is an unusually long process.

Therefore, the sole course open to the Federal Power Commission when presented with this record was, in exercise of its powers under Section 7 of the Act, to condition the grant of the certificate on the adoption of a lower initial price. Such a condition would bring the price under the provisions of Section 4 of the Act and would enable the producer to obtain the rate for which he had bargained. It would likewise guarantee that the consumer may recover refunds for monies paid should the rate subsequently be determined to be excessive. And it would not either deter other producers from entering the interstate market or deprive the instant producers of their proposed rates and resultant profits if they should prove justified.

Thus, the decision by the Federal Power Commission to issue a certificate without a price condition, thereby

[2] The City of Philadelphia owns the Philadelphia Gas Works which is operated by the United Gas Improvement Company as agent for the City. All profit, if any, inures to the benefit of the City, its operating agent receiving a flat management fee.

permitting to go into effect a price in excess of any price previously paid by United, a price 85 per cent higher than United's weighted average cost of gas, leaves consumers entirely bereft of effective protection against unwarranted price increases.

It is for these reasons that this Brief *Amicus Curiae* is filed.

THE WRIT SHOULD BE DENIED

Petitioners have not advanced one sound reason for the Court to issue a Writ of Certiorari in this proceeding. The Court below followed the letter and spirit of this Court's *CATCO* decision.

This Court declared that the Natural Gas Act must be administered so as to "afford consumers a complete, permanent and effective bond of protection from the excessive rates and charges."[3] The Court below cited and applied this Court's direction in *CATCO*, that "where the application on its face or on presentation of evidence *signals* the existence of a situation that *probably* would not be in the public interest," "a permanent certificate *should not be issued.*"[4]

Petitioners have attempted to change the focus of this Court's unequivocal holding in *CATCO*. Petitioners appear to urge that if *any* basis for a price increase can be found, an unconditioned permit should be issued.

However, this Court rejected a similar argument in *Transco Seaboard*.[5] Therefore, the Court below has properly applied this Court's *CATCO and Transco Seaboard* decisions. No need, indeed no question of substantial importance, is presented for this Court to grant certiorari

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[3] 360 U. S. at 388.

[4] 360 U. S. at 391. Emphasis supplied.

[5] *United Gas Improvement Co. v. FPC*, 269 F. 2d 865, rev'd 361 U. S. 195 (1959).

in order to reaffirm what it has already made abundantly clear and has been fully understood and correctly applied by the Court below as well as the three other Courts of Appeals which have been called upon to interpret and apply the *CATCO* decision.[6]

Moreover, it is of utmost significance that the Federal Power Commission has not challenged either the ruling of the Court below or the decisions of the other Courts of Appeals which similarly have reversed its decisions. There is no justification for adding to this Court's heavy burden by issuing certiorari in this proceeding when the Commission itself is not requesting further clarification of this Court's decisions interpreting Section 7 of the Act.

The Court below, in reversing the Federal Power Commission's approval of a sale price representing a sharp increase over pre-*CATCO* price levels, did no more than to merely reaffirm this Court's mandate in *CATCO* that the Natural Gas Act requires the Federal Power Commission to protect consumers by appropriate conditions against prices which may be unlawful, pending a determination in other proceedings of the producers' actual costs and revenue needs.

Petitioners' argument that the decision of the Court below unduly limits the Commission's discretion under Section 7 of the Act and handicaps the Commission in disposing expeditiously of producer certificate proceedings constitutes no basis for issuing certiorari. First, it is incorrect

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[6] *Texas Gas Transmission Corp., et al.*, 22 FPC 378, rev'd, *Public Service Comm'n v. FPC*, No. 15,461, CA DC (December 8, 1960), cert. pending sub nom. *Shell Oil Co. v. Public Service Comm'n*, Nos. 774, 793, Oct. Term 1960 (Opinion printed Shell Pet. 28—33); *Sunray Mid-Continent Oil Co.*, 22 FPC 361, rev'd, *United Gas Improvement Co. v. FPC*, No. 6280, CA 10 (January 23, 1961) (Opinion printed Shell Pet. 49—55); *Sun Oil Co.*, 22 FPC 851, rev'd, *United Gas Improvement Co. v. FPC*, No. 18,112, CA 5 (February 22, 1961) (Opinion printed Shell Pet. 56—66, 69—85); *The Superior Oil Co.*, 22 FPC 369, rev'd, *United Gas Improvement Co. v. FPC*, No. 18,113, CA 5 (February 22, 1961) (Opinion printed Shell Pet. 67—85).

to charge as error that the Court's decision imposes a burden on the Commission to insure the full protection of consumers by adequate price conditions. Indeed, such consumer protection is the prime reason for gas rate regulation. Second, the Federal Power Commission itself does not appear to share petitioners' views that its procedures will be crippled by the requirement of a "careful scrutiny and responsible reaction to initial price proposals of producers under §7", for the Commission is not now seeking issuance of a Writ of Certiorari. Third, the fact that the Federal Power Commission cannot rely on prices certificated under an erroneous view of law is hardly a procedural handicap or limitation on the Commission's discretion in authorizing producer sales. It can and should follow the course suggested in *CATCO*, and condition the certification as to price pending further and fuller information and analysis of producer costs and revenue needs.

Conclusion

For the foregoing reasons, it is respectfully requested that the petitions for certiorari be denied.

Respectfully submitted,

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